

**IN THE COURT OF APPEAL OF TANZANIA
AT SONGEA**

MISC. CIVIL APPLICATION NO. 490/13 OF 2020

BAHATI M. NGOWI..... APPLICANT

VERSUS

PAUL AIDAN ULUNGI.....RESPONDENT

**(Application for Extension of Time to Serve the Respondent with the Notice
of Appeal against the Decision of the High Court of Tanzania, at Iringa)**

(Feleshi, J.)

dated the 10th day of October, 2017

in

DC Civil Appeal No. 15 of 2016

RULING

15th & 16th August, 2023

KEREFU, J.A.:

The applicant, Bahati M. Ngowi, has lodged this application seeking orders for extension of time within which to serve the notice of appeal to the respondent out of time against the decision of the High Court of Tanzania at Iringa, (Feleshi, J.) dated 10th October, 2017 in DC Civil Appeal No. 15 of 2016. The application is brought by way of notice of motion lodged on 13th February, 2020 under Rules 10 and 47 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The Application is supported by

an affidavit of the applicant. On the other hand, the respondent has filed an affidavit in reply opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to the current application. The application traces its origin from the decision of the High Court (Feleshi, J.) dated 10th October, 2017 in respect of DC Civil Appeal No. 15 of 2016. Being aggrieved by that decision, the applicant lodged a notice of appeal in this Court on 24th October, 2017 to challenge the said decision. However, having shifted her place of abode from Iringa to Dat es Salaam, she instructed her advocate to process the appeal. The applicant deposed further that, on 20th August 2018, she felt sick and later, on 23rd August, 2018 she was admitted at ALT Centre Clinic for diagnosis on her health condition.

Subsequently, she was referred to Muhimbili National Hospital for further diagnosis on serious gynecological condition and underwent cervical stump surgery which was complicated. As such, the applicant was advised to have bed rest for three months and excused from any strenuous work.

Upon recovery, the applicant travelled back to Iringa in 2019 where she discovered that her advocate mishandled her case and she thus

decided to engage another advocate. That, the applicant filed Misc. Civil Application No. 11 of 2019 before the High Court where she prayed for the same orders as in this application. Having heard the parties, the High Court (Ngwala, J.) dismissed the said application with costs on 23rd April, 2019.

Undaunted, the applicant lodged the current application as indicated above. It is the applicant's contention that, she failed to serve the notice of appeal to the respondent within time due to her ill health and the negligence of her former advocate. She thus prayed for the Court to grant that prayers sought in the notice of motion.

In his affidavit in reply, the respondent opposed the application by stating that the delay was due to the negligence of the applicant and his former counsel which, he said, do not constitute sufficient reason to warrant the Court to grant extension of time. The respondent contended further that, the applicant's application is an afterthought because the notice of appeal was filed on 24th October, 2017 and served to the respondent on 8th January, 2018 after lapse of almost seventy-four (74) days, which was prior to the applicant's alleged sickness that started on 20th August, 2018.

When the application was placed before me for hearing, the applicant was represented by Mr. Cosmas Kishamawe, learned counsel whereas the respondent was represented by Mr. Jassey Mwamgiga, also learned counsel. Both learned counsel appeared through a video facility linked.

Submitting in support of the application, Mr. Kishamawe commenced his submission by fully adopting the contents of the notice of motion and the supporting affidavit. He thereafter, narrated the historical background to this application as indicated above and argued that, the applicant has taken various steps to challenge the impugned decision including, timely lodging of the notice of appeal. He argued that the main reasons for the delay to serve the notice of appeal to the respondent within time is the applicant's ill health which started on 20th August, 2018 and the negligence of her former advocate.

Upon being probed, if the applicant has accounted for the delay of each day in her affidavit, specifically from the date of lodging of the notice of appeal on 24th October, 2017 to 19th August, 2018 before she became unwell, Mr. Kishamawe, although conceded that the applicant has not accounted for the delay of that period in the affidavit, he urged me to find that the extension of time is still warranted as under paragraphs 3 and 4 of

the said affidavit the applicant has indicated that after lodging the notice of appeal she relocated from Iringa to Dar es Salaam hence it became difficult for her to make follow up on the progress of the appeal. He thus, finally, prayed for the application to be granted to allow the applicant to serve the notice of appeal to the respondent out of time.

In response, Mr. Mwamgiga also commenced his submission by adopting the contents of the affidavit in reply. He then strenuously opposed the application by arguing that the applicant has completely failed to demonstrate good cause for extension of time. He clarified that, in her affidavit in support of the application, the applicant has not accounted for the delay of each day as readily conceded by Mr. Kishamawe.

He contended further that the reason of the applicant's illness which was submitted by Mr. Kishamawe is nothing but an afterthought. To clarify further on this point, Mr. Mwamgiga referred me to the notice of appeal attached to the applicant's affidavit and argued that, the said notice was lodged in this Court on 24th October, 2017 and the applicant's sickness started on 20th August, 2018 after lapse of almost ten (10) months from the date of lodging of the said notice. He argued further that, pursuant to Rule 84 (1) of the Rules, the said notice was supposed to be served to the

respondent within fourteen (14) days after being lodged in Court i.e 8th November, 2017 but that was not done. He thus insisted that, the applicant's sickness which started on 20th August, 2018 is an afterthought and is not of any assistance to the applicant as by that time, she was already out of time to serve the respondent with the said notice.

As regards the second reason on the negligence of the applicant's former counsel, Mr. Mwamgiga argued that, it is settled that the negligence of an advocate does not constitute sufficient cause for the delay. He equally blamed the applicant for failure to make follow up on the progress of her appeal. He stressed that, the Court should not condone a person who sits over her rights for a long period of almost ten (10) months without serving the said notice to the respondent. Based on his submission, Mr. Mwamgige urged me to dismiss the application with costs on account of failure by the applicants to demonstrate good cause for the delay.

In his brief rejoinder, Mr. Kishamawe mainly reiterated what he submitted earlier and once again prayed for the application to be granted.

Having heard the counsel for the parties, the main issue for my consideration is whether the applicant has submitted good cause for the delay to warrant grant of this application. It is essential to reiterate that

the Court's power of extending time under Rule 10 of the Rules is both wide-ranging and discretionary but the same is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal - see; **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 and **Attorney General v. Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016 (both unreported) to mention but a few.

It is equally important to stress the general principle of law that, an application for extension of time shall not be granted where the delay is due to indolent, inaction and or lack of vigilance on the part of the applicant or her counsel, if has one. See for instant our previous decisions

in **Loswaki Village Council and another v. Shibeshi Abebe**, [2000] T.L.R. 204 and **Mwananchi Engineering and Constructing Corporation v. Manna Investimates (PTY) Limited and Holtan Investments Company Limited**, Civil Application No. 5 of 2006 (unreported), where the Court stressed that those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law, and that they must demonstrate diligence.

Now, in the application at hand, the two reasons for the delay advanced in the affidavit in support of the application and the oral submission by Mr. Kishamawe are; **first**, the long illness on the part of the applicant, which is said to have started on 20th August, 2018 and culminated into her absence in Iringa as she had to relocate to Dar es Salaam for medical treatment; and **secondly**, the negligence of her former advocate who did not serve the respondent with the notice of appeal within the prescribed time.

Starting with the first reason, it is on record that, the impugned decision of the High Court was handed down on 10th October, 2017 and the notice of appeal was lodged within time on 24th October, 2017.

However, the said notice was not served to the respondent till sometimes on 8th January, 2018 after lapse of almost seventy-four (74) days reckoned from the date of lodging of the notice of appeal. Pursuant to paragraph 8 of the applicant's affidavit in support of the application, she associated the said delay with her illness which she stated that it started on 20th August, 2018. As correctly argued by Mr. Mwamgige, it is clear from those facts that, by the time the applicant became unwell, she was already late to serve the notice of appeal to the respondent as pursuant to Rule 84 (1) of the Rules, the notice of appeal is required to be served to the respondent within fourteen (14) days from the date of lodging of notice of appeal. For the sake of clarity, the said Rule provides as follows:

"An intended appellant shall, before or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal..."[Emphasis added].

Following the requirement of the above provision, in the instant application, the applicant, having lodged the notice of appeal on 24th October, 2017, she was expected to serve the notice of the appeal to the respondent before or by 8th November, 2017 and not otherwise. As such, I

agree with Mr. Mwamgige that the applicant's claim that the delay was due to her ill health which started on 20th August, 2018 is misconceived.

Unfortunately, and as well conceded by both learned counsel for the parties, in her affidavit in support of the application, the applicant has not accounted for the period of delay from 24th October, 2017 to 19th August, 2018 before she became unwell. It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases – see for instance the cases of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 04 of 2014 (both unreported). Specifically in the former case, the Court emphasized that:

"...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken." [Emphasis added].

Being guided by the above authorities, I agree with Mr. Mwamgige that, in the instant application, the applicant has completely failed to

account for the delay of each day and as such, the first reason for the delay argued by Mr. Kishamawe cannot stand.

Coming to the second reason, the applicant has attributed her delay to serve the notice of appeal to the respondent with the negligence of her former advocate, though in her affidavit, she did not state the name of the said advocate and/or when exactly she instructed him or her to pursue the appeal. However, under paragraph 9 of the said affidavit, the applicant stated that, upon lodging the said notice on 24th October, 2017, the said advocate never acted diligently to serve the same to the respondent within the time stipulated by the law. No doubt that, these allegations depicts outright negligence, lack of diligence and seriousness on the part of the said Counsel. By any standard, and as rightly argued by Mr. Mwamgiga, this cannot constitute sufficient reason for the delay and the same cannot bail out the applicant as per the established principles. See for instance the case of **Mwananchi Engineering and Constructing Corporation** (supra) where the Court refused to bless the negligence of the applicant's counsel. Similarly, in this case, the negligence of the former applicant's counsel cannot be blessed by this Court.

In addition, and as correctly argued by Mr. Mwamgiga, even if the applicant had instructed the said advocate to pursue the appeal, she was still duty bound to make follow up on the progress of her appeal. Unfortunately, in her affidavit, the applicant has not stated any personal efforts made by her to make follow up on the progress of her appeal. In **Lim Han Yung and Another v. Lucy Treseas Kristensen**, Civil Appeal No. 219 of 2019 [2019] TZCA 400: [28 June 2022: TANZLII], the Court when faced with an akin situation, observed that:

"We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case."

Likewise, in the instant application, the applicant, after she had instructed her former advocate to process the appeal, she was expected to make follow up of the progress of her appeal and not otherwise. Now, since in her affidavit in support of this application, the applicant has not

indicated any step taken by her to do so, her act of shifting the blame to the former counsel is, with due respect, without any justification.

From the foregoing, it is clear that there are no good causes for extension of time can be said to have been shown in the circumstances of this application. In the event, I find no merit in the application and I hereby dismiss it with costs.

It is so ordered.

DATED at **SONGEA** this 15th day of August, 2023.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 16th day of August, 2023 in the presence of Mr. Jassey Mwamgiga holding brief for Mr. Cosmas Kishamawe, learned Advocate for the Applicant and Mr. Jassey Mwangiga. Learned Advocate for the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL